

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
Emily M. Thor (SBN 303169)
2 **DEPARTMENT OF WATER RESOURCES**
Office of the Chief Counsel
3 1416 9th St., Room 1104
Sacramento, CA 95814
4 Telephone: 916-653-5966
E-mail: jmizell@water.ca.gov

5 Attorneys for California Department of Water
6 Resources

7
8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **HEARING IN THE MATTER OF CALIFORNIA**
11 **DEPARTMENT OF WATER RESOURCES**
12 **AND UNITED STATES BUREAU OF**
13 **RECLAMATION REQUEST FOR A CHANGE**
14 **IN POINT OF DIVERSION FOR CALIFORNIA**
15 **WATER FIX**

DWR CONSOLIDATED OPPOSITION
TO SAN JOAQUIN COUNTY, ET
AL.'S MOTION TO STRIKE THE
PART 2 REBUTTAL TESTIMONY OF
DR. HANSON AND DR. HUTTON
AND
JOINDER BY MS. DES JARDINS

16 The California Department of Water Resources (“DWR”) opposes the motion to
17 strike Part 2 Rebuttal testimony of Dr. Hanson and Dr. Hutton that was jointly filed by
18 San Joaquin County et al. and Local Agencies of the North Delta on August 15, 2018.
19 DWR also opposes California Water Research’s Joinder and Motion to Strike Portions
20 of Testimony of Shawn Acuna filed on August 15, 2018.

21 The Part 2 Rebuttal testimonies of Dr. Hanson, Dr. Hutton and Dr. Acuna have a
22 clear basis in the record of Part 2 Case-in-chief testimony by other parties and is
23 therefore proper rebuttal testimony submitted by DWR. It should be noted that the
24 argument by the motions to strike are entirely inconsistent with the ruling of the Hearing
25 Officers made verbally on August 17, 2018 in relation to striking Dr. Denton’s rebuttal
26 testimony whereby it was determined rebuttal testimony that relates to what was
27 missing from case-in-chief testimony is permissible. (See August 17, 2018 Transcript
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1 when available.)
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4 **I. ARGUMENT IN RESPONSE TO CHALLENGES OF DR. HANSON'S AND**
5 **DR. HUTTON'S TESTIMONIES**

6 San Joaquin County et al. are incorrect that citations provided, as well as other
7 statements found in the record, provide sufficient basis for Dr. Hanson's and Dr.
8 Hutton's rebuttal testimonies.

9 **a. Other Parties Argue that Flow is the Factor to Consider Without**
10 **Regard to Other Stressors**

11 The record is quite clear that extensive testimony was received from other parties
12 regarding the 2010 Flow Criteria Report (SWRCB-25). It is incorrect to believe that the
13 2010 Flow Criteria Report was merely tangentially referenced in other parties' cases-in-
14 chief. Rather, many parties argued for the adoption of the 2010 Flow Criteria Report as
15 the appropriate Delta flow criteria required by the 2009 Delta Reform Act (CA Water Code
16 §85086(c)(2)). In arguing this position, those parties asked the Hearing Officers to ignore
17 the extensive caveat contained in the 2010 Delta Flow Criteria Report that states quite
18 clearly that it evaluated flows to the exclusion of other factors.

19
20 This report, required by Water Code section 85086(c) (2009 Delta
21 Reform Act) in 2010, suggests the flows that would be needed in the Delta
22 ecosystem if fishery protection was the sole purpose for which its waters
23 were put to beneficial use. In keeping with the narrow focus of the
24 legislation, this report only presents a technical assessment of flow and
operational requirements to provide fishery protection under existing
conditions.

25 We know however, that there are many other important beneficial uses
26 that these waters support such as municipal and agricultural water supply
27 and recreational uses. The State Water Board is required by law to
28 establish flow and other objectives that ensure the reasonable protection of
beneficial uses. In order for any flow objective to be reasonable, the State
Water Board must consider and balance all competing uses of water in its

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decision-making. More broadly, the State Water Board will factor in relevant water quality, water rights and habitat needs as it considers potential changes to its Bay-Delta objectives. Any attempts to portray the recommendations contained in this report as an indicator of future State Water Board decision-making ignores this critical, multi-dimensional balancing requirement and misrepresents current efforts to analyze the water supply, economic, and hydropower effects of a broad range of alternatives. This report represents only one of many factors that will need to be balanced by the State Water Board as it updates the Bay-Delta Water Quality Control Plan. For more current information on the State Water Board's Bay-Delta Plan update efforts, please visit http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/. (SWRCB-25, p. 1 "Note to Readers", *emphasis added*.)

For instance, Contra Costa County et al. argues in CCC-SC-3 on page 6 that flows contained in the 2010 Delta Flow Criteria Report are "important for protection of public trust resources in the Delta ecosystem, and are supported by scientific information on function-based species or ecosystem needs." (SWRCB-25, p.129.) Contra Costa County goes on to argue on p.38 that the Hearing Officers should impose as a permit term the flow requirements of the 2010 Flow Criteria Report entirely upon the SWP and CVP. They state, "the SWRCB should consider prohibiting use of the proposed WaterFix intakes and tunnels, if built, unless Delta outflows are high enough to be consistent with the SWRCB's 2010 Delta Flow Criteria."

Furthermore, NRDC-58 Errata on page 4 states that "in a typical year, more than 50% of the freshwater runoff destined for the Bay during the ecologically critical winter and spring months is diverted before it reaches the Bay (TBI 2016). This large-scale diversion of freshwater, combined with the alteration in the natural timing of flow, has been a major driving force in the decline of ecosystems throughout the San Francisco Bay Estuary and watershed, including the endangerment or near-endangerment of many of its native fish species. The diversion of fresh water and alteration of natural flow patterns has become more severe in recent years and decades; as a result, populations of many native fish

1 species have declined precipitously.” (emphasis added) The focus on flow without any
2 discussion of the multiple additional factors recognized by the 2010 Flow Criteria Report
3 clearly provides a basis for testimony regarding that omission.

4 In that same exhibit on page 10, NRDC states that survival is linked to higher flows
5 during outmigration periods, again focusing solely upon flow. And again on page 19, NRDC
6 claims that “survival of juvenile winter-run Chinook salmon through the Delta was correlated
7 with Delta outflow” and then cites to the State Water Board’s own Phase II Scientific Basis
8 Report to repeat his conclusion that outflow is the factor linked to salmon survival.

9 Additionally, CSPA-307, slides 3 through 5, reproduce the CDFW flow tables found
10 on pages 105-107 of the November 2010 *Quantifiable Biological Objectives and Flow*
11 *Criteria* document. These flow numbers are presented as complete recommendations of
12 CDFW. On CSPA-202-errata, page 6, Mr. Shutes states that “in hearing, CDFW
13 recommends specific protection, mitigation and enhancement measures, including
14 instream flows and in some case reservoir operations.” He goes on to state that in the
15 absence of CDFW appearing in the hearing that he would present what CDFW previously
16 stated regarding “appropriate Delta flow criteria” (CSPA-202-errata, p.7.) And what Mr.
17 Shutes presumes is appropriate are excerpts of a flow report that focus solely on flow. In
18 fact, Mr. Shutes is arguing that, if CDFW were appearing at the hearing, the flow-centric
19 numbers contained in CDFW’s November 2010 flow criteria are equivalent to appropriate
20 Delta flow criteria. (CSPA-202-errata, p.8.)

21 An argument to adopt the flows contained in the 2010 Flow Criteria Report, or the
22 CDFW November 2010 flow criteria, is an argument to consider flows to the exclusion of
23 other factors.

24 Much of the discussion regarding the direct applicability of the 2010 Flow Criteria
25 Report is found throughout the transcripts for April 11, 2018. Some example citations were
26 included in the testimony of Dr. Hanson and Dr. Hutton. As illustration, on April 11, 2018
27 on both pages 24, 112 and 122, Mr. Baxter states that flow is an “overarching driver” that
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1 “influences a number of the other ones.” Mr. Baxter’s statements are clear, and if reviewed
2 in their entirety would reinforce the fact that he was arguing that flow, above all else, is
3 needed to resolve the existing conditions in the Delta. On page 122, the cross-examiner
4 states in summary, “Just a couple quick questions with regard to the 2010 Delta Flow
5 Recommendations Report that I believe you – you testified about earlier. Do you recall that
6 report?” Mr. Baxter responds in the affirmative and several pages later eventually confirms
7 that it supports his opinions.

8 Lastly, Mr. Jennings testified on March 27, 2018 that the 2010 Delta Flow Criteria
9 Report and the CDFW November 2010 flow criteria are the “best available science.”
10 (Transcript for March 27, 2018, Volume 22, p.18.) This testimony clearly tries to argue that
11 the flow criteria need not be considered in light of new and emerging science that has
12 occurred since 2010.

13 **b. Other Parties Argue that Existing SWP/CVP Operations are the**
14 **Cause of Existing Delta Conditions and Therefore Must be**
15 **Reevaluated**

16 Additionally, San Joaquin County et al. argues that Dr. Hanson’s and Dr. Hutton’s
17 rebuttal testimony opinions that factors beyond the SWP and CVP must be considered by
18 the Hearing Officers are in direct response to arguments presented by multiple parties that
19 the existing operations of the SWP and CVP must be reevaluated and further conditioned
20 due to the alleged causation by the SWP and CVP of the existing conditions in the Delta.
21 Any arguments to reevaluate the existing operations of the SWP and CVP are premised
22 solely upon a causation argument. Absent causation there would be no basis for
23 reevaluation or further conditioning. DWR must be allowed to rebut this erroneous
24 presumption that underlies this argument.

25 For instance, CSPA-202-errata on page 2 states that “in considering conditions to
26 place on the permits for the SWP and CVP in this proceeding, the Board can and must
27 evaluate conditions for all aspects of the SWP and CVP operations, not just those
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1 immediately related to the new points of diversion.” CSPA-204 on page 7 states that
2 “relaxation in drought periods [of conditions on the existing projects] are the primary cause
3 of drastic declines in Bay-Delta fish populations over the past five decades.” This
4 conclusion clearly states that other factors are not the primary cause of the existing
5 conditions in the Delta.

6 Furthermore, CSPA-202-errata on page 9 states that “the Board must require permit
7 conditions that protect fish from harm at the south Delta export facilities, whatever the SWP
8 and CVP’s operation of those facilities may eventually be.” To deny that this tries to directly
9 link the existing conditions in the Delta to the existing SWP and CVP operations is not
10 credible.

11 If that wasn’t sufficient, CSPA-204 on page 7 states “The Reasonable and Prudent
12 Actions (RPAs) in the 2008-09 BO’s and their updates have proven insufficient to protect
13 fish and fish habitat.” The 2008-09 BO’s only apply to the SWP and CVP. The claim that
14 the 2008-09 BO’s have proven insufficient is based on a claim that the SWP and CVP alone
15 are the cause of the existing conditions in the Delta.

16 **c. Other Parties Argue that Existing Conditions are Not**
17 **Representative of Historical Outflow**

18 Contra Costa County et al. argues in CCC-SC-3 on page 7 that “the Petitioners
19 have failed to present any information in Part 1 of this hearing showing Delta inflows and
20 outflows as a function of unimpaired flow.” Unimpaired flow is one proposed measure of
21 historical outflow. Contra Costa County proceeds to base their argument about the
22 sufficiency of Petitioner’s evidence upon this statement. This is not a passing reference
23 by Contra Costa County. It is a key premise of entire portions of their Part 2 case-in-
24 chief. Responding to the notion of unimpaired flow, disputing whether or not it constitutes
25 historical outflows, and how those are or are not represented by existing conditions is
26 proper.

27 Furthermore, Antioch-500-errata states on page 3 in the summary of Dr. Paulsen’s
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1 opinions that she believes “prior to about 1917, water within the Delta and at Antioch’s
2 intake location was historically fresh.” She goes on to state that higher outflow than
3 existing conditions, as represented by CWF Boundary 2 scenario “is closest to ‘natural’
4 flow conditions.” These two opinions are elaborated upon extensively on pages 4-14.

5 Lastly, Mr. Baxter discusses during his oral testimony that what he is discussing in
6 his testimony is, “referring to what might have been historical natural hydrology.”
7 (Transcript, Vol. 28, April 11, 2018, p.119.) Mr. Baxter then proceeds to discuss with the
8 cross-examiner how his testimony relates to this concept through page 122.

9 **d. PCFFA-145**

10 PCFFA-145 was entered and accepted into evidence on April 19, 2018. It consists
11 of a report “addressing Flow Criteria for the Delta Ecosystem Necessary to Protect Public
12 Trust Resources (February 16, 2010.)” The content of this report details the arguments
13 for additional flow and the minor role played by other stressors. It’s submission into
14 evidence by PCFFA makes it a permissible basis upon which to file rebuttal testimony.
15 The concepts discussed by Dr. Hutton and Dr. Hanson are found throughout this report.
16 Therefore, PCFFA-145 is also a clear basis upon which to allow the rebuttal testimony of
17 both these witnesses.

18 **II. Dr. Hanson’s Testimony is Based on Clear Statements of Other Parties**
19 **in the Record that were made during Part 2 Cases-in-chief**

20 The statements upon which San Joaquin County et al. base their motion to strike
21 Dr. Hason’s testimony is that the statements found on DWR-1223, pp. 2 and 3 are
22 insufficient to support his opinions. Dr. Hanson cites CSPA-202-errata pp.7-12, CSPA-
23 204 pp.7 and 31-32, NRDC-58-errata pp.4-24, PCFFA-145 and portions of the transcript
24 related to other parties’ oral testimony during their cases-in-chief. San Joaquin County et
25 al. are incorrect that these statements, as well as others found in the record, provide
26 insufficient basis for Dr. Hanson’s rebuttal.

27 **III. Dr. Hutton’s Testimony is Based on Clear Statements of Other Parties**

1 **in the Record that were made during Part 2 Cases-in-chief**

2 The statements upon which San Joaquin County et al. base their motion to strike
3 Dr. Hutton’s testimony is that the statements found on DWR-1224, pp. 2 are insufficient to
4 support his opinions. Dr. Hutton cites CSPA-202-errata pp.2, 7-12, PCFFA-145, PCFFA-
5 161 p.8, CCC-SC-3, Antioch-500-errata and portions of the transcript related to other
6 parties’ oral testimony during their cases-in-chief. San Joaquin County et al. are incorrect
7 that these statements, as well as others found in the record, provide insufficient basis for
8 Dr. Hanson’s rebuttal.

9 **IV. ARGUMENT IN RESONSE TO CHALLENGE OF DR. ACUNA’S**
10 **TESTIMONY**

11 The statements upon which Ms. Des Jardins bases her motion to strike Dr. Acuna’s
12 testimony is that the statements found in DWR-1211 are the cites CSPA-202-errata pp. 7-
13 11, CSPA-204 p.4, NRDC-58 Errata pp.34-36, 39-40 and portions of the transcript related
14 to other parties’ oral testimony during their cases-in-chief. Ms. Des Jardins is incorrect.
15 These statements, as well as others, provide sufficient basis for Dr. Acuna’s rebuttal.

16 **a. DWR-1211, Pages 2:24-3:2**

17 I am also responding to several parties whose experts suggested that the SWRCB’s
18 2010 Flow Criteria Report and the SWRCB’s Phase II Technical Basis Report
19 recommended standards should be accepted without modification, suggesting that
20 there was no new relevant information that should also be considered. (See e.g.,
CSPA-202, errata, pp. 7-11; April 11, 2018, Transcript, Vol. 28, p. 122; April 24,
2018, Transcript, Vol. 33, pp. 110-115; PCFFA-161, p. 8:7-9.)

21 (DWR-1214, Pages 2:24-3:2.)

22 Ms. Des Jardins moves to strike the above statement alleging that it is a
23 mischaracterization of the testimony it is rebutting and that the Delta Flow Criteria Report
24 (“2010 Report”) is outside the scope of Part 2 Rebuttal.

25 **i. Mischaracterization**

26 In CSPA-202, errata, Mr. Shutes discusses 2010 Report. On page 5 of this exhibit
27 Mr. Shutes indicates that the 2010 Report contains the best available science. (CSPA-202,
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1 errata, page 5.) Then in pages 7-11 Mr. Shutes proceeds to use the 2010 Report as a
2 basis for discussion tacitly accepting the report as best available science as more recent
3 studies are barely referenced to help characterize the discussion. CSPA-202, errata implies
4 that the 2010 Report are the relevant standards that should be used and provide a clear
5 basis for the above statement in Dr. Acuna's testimony. As such Mr. Acuna's statement
6 should not be stricken on the grounds put forth by Ms. Des Jardins.

7 **ii. Scope**

8 Ms. Des Jardins alleges that per the Board's August 8, 2018, Ruling, the 2010
9 Report is outside the scope of rebuttal and therefore testimony by Dr. Acuna that goes
10 towards rebutting the 2010 Report or the Scientific Basis Report and not witness testimony
11 is outside the scope of rebuttal.

12 As there was no written ruling issued by the Board on August 8, 2018, and no
13 rebuttal proceedings took place on that day, it is unclear to which ruling Ms. Des Jardins is
14 referring. On July 27, 2018, the Board determined that the 2010 Report was not admitted
15 into evidence and therefore not proper for Part 2 rebuttal. (Ruling July 27, 2018.) However,
16 the Board revised this Ruling on August 6, 2018, as the California Sportfishing Protection
17 Alliance listed the 2010 Report on its Part 2 Exhibit Identification Index, for which no
18 objections were made regarding the 2010 Report. The August 6, 2018, Ruling, determined
19 that the 2010 Report is the proper subject of rebuttal with some limitations as not all
20 aspects of the 2010 Report are relevant to the California WaterFix, in particular the merits
21 of the Vernalis flow criteria. As such, Ms. Des Jardins is incorrect in her assertion that
22 statements in Dr. Acuna's testimony rebutting the 2010 Report are per se outside the scope
23 of Part 2 rebuttal.

24 **b. DWR-1211, Opinion 1, Pages 3:21 to 4:12**

25 Ms. Des Jardins moves to strike Opinion 1 on the grounds that it does not indicate
26 the testimony to which it is responding. The opinion stated by Dr. Acuna is: "The effects of
27 Current SWP-CVP Operations on Delta Smelt are uncertain, and should be managed
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1 accordingly.” The citations for the testimony to which Opinion 1 is responding to were
2 inadvertently left out. The first sentence of this opinion should have cited, for example, to
3 the April 11, 2018, Transcript, pp. 110-112. This is the cross-examination of Randall Baxter
4 related to the environmental drivers shown in Figure 8 of Exhibit FOR-60, *Interagency*
5 *Ecological Program 2010 Pelagic Decline Work Plan and Synthesis of Results*. Figure 8
6 describes ranking environmental drivers for the delta ecosystem with flow at the top. During
7 this cross-examination Mr. Baxter agreed that the order of the factors was correct, with flow
8 being the primary. As current SWP-CVP operations effect Delta flow, the cross-examination
9 of Randall Baxter implies that the water project operations are a primary cause of low Delta
10 smelt abundance indices. (DWR 1214, Page 3:24-26) Opinion 1 of Dr. Acuna’s testimony
11 rebuts this suggestion by explaining the complex relationship between flow and species
12 abundance. (DWR 1214; Pages 3:26-4:12.) Additional testimony in support of this opinion
13 being within the scope of part 2 rebuttal can also be found at NRDC-58, errata, pages 34-
14 36.

15 Furthermore, Mr. Jennings testified on March 27, 2018 that the 2010 Delta Flow
16 Criteria Report and the CDFW November 2010 flow criteria are the “best available science.”
17 (Transcript for March 27, 2018, Volume 22, p.18.) This testimony clearly tries to argue that
18 the flow criteria need not be considered in light of new and emerging science that has
19 occurred since 2010.

20 As such, Opinion 1 of Dr. Acuna’s testimony should not be stricken.

21 **c. DWR-1211, Pages 5:9 to 5:25**

22 Ms. Des Jardins moves to strike page 5, lines 9 to 25 alleging that this portion of the
23 testimony is outside the scope of Part 2 Rebuttal due to a lack of testimony by protestants
24 on “new studies” or “turbidity bridges.” This assertion mischaracterizes the testimony by
25 isolating these terms from the context in which they were provided.

26 The first sentence in opinion 2 of Dr. Acuna’s testimony clearly lays out the
27 testimony to which he is rebutting. “Entrainment at the Project pumps was identified as a
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1 significant impediment to species viability by NRDC-58, errata, pp.34-36; CSPA-204, p. 4;
2 and April 23, 2018, Transcript, Vol. 32, pp. 138-139.” (DWR-1211, page 4:15-25.) Dr.
3 Acuna rebuts this by explaining that even though entrainment at the south delta pumping
4 facilities is low, Delta Smelt abundance does not appear to be improving. (DWR-1214,
5 page 4:17-5:9.) Dr. Acuna then describes the actions being taken by DWR and
6 Reclamation to prevent entrainment of Delta Smelt at the south Delta pumping facilities.
7 (DWR-1214, page 5:9-5:25.) It is this paragraph that Ms. Des Jardins moves to strike.

8 This testimony provides direct support for Dr. Acuna’s opinion that current Delta
9 smelt proportional entrainment in the SWP-CVP South Delta Pumping Facilities is Low in
10 direct response to testimony suggesting otherwise. As such, this information is appropriate
11 for Dr. Acuna to have included in his testimony and is within the permissible scope of part 2
12 rebuttal.

13 **d. DWR-1211, Pages 9:11-21**

14 Ms. Des Jardins moves to strike page 9, lines 11-21 alleging that the testimony is a
15 general discussion of Delta smelt migratory behavior and is not linked to another witnesses’
16 testimony. This is a mischaracterization of the testimony being provided.

17 Opinion 4 of Dr. Acuna’s testimony is in response to Dr. Rosenfield suggesting “that
18 changes in the location of the low salinity zone could increase entrainment risk. (NRDC-
19 58m pp. 34-36.)” (DWR1211, page 8:21-22.) Dr. Acuna responds in his testimony that
20 Delta smelt behavior is more complex than this suggests and goes on to discuss the
21 behaviors of Delta smelt in support of his opinion. (DWR1211, page 8:22-9:25.) The
22 statements in this opinion that Ms. Des Jardins has moved to strike are an explanation of
23 the multiple factors affecting migratory behavior, not just salinity. As this testimony is
24 directly responsive to the suggestion of Dr. Rosenfield linking the movement of the salinity
25 zone with Delta Smelt behavior it is within the scope of part 2 rebuttal and should not be
26 stricken.

1 **e. DWR-1211, Page 10:4-7**

2 Ms. Des Jardins moves to strike page 10, lines 4-7, on the grounds that these
3 statements are not linked to testimony on contaminants. By singling out the term
4 “contaminant” and taking it out of context Ms. Des Jardins is mischaracterizing Dr. Acuna’s
5 testimony.

6 In Opinion 5 Dr. Acuna is responding the argument by Dr. Rosenfield “that CWF
7 related changes in flow would reduce Delta Smelt growth and recruitment through reduced
8 turbidity and food availability. (NRDC-58, pp. 36, and 39-40.” (DWR-1211, page 9:28-10:2.)
9 In lines 4-7 on page 10 Dr. Acuna uses the term contaminants in explaining the relationship
10 between flows and turbidity as this is a factor that could impact Delta smelt. (DWR 1214,
11 page 10:2-7.) This is directly responsive to Dr. Rosenfield’s argument, appropriate
12 testimony for Part 2 rebuttal, and should not be stricken.

13 **f. DWR-1211, Page 10:11-19**

14 Ms. Des Jardins moves to strike page 10, lines 11-19, on the grounds that the
15 testimony is not linked to other testimony. Again, Ms. Des Jardins is mischaracterizing the
16 Dr. Acuna’ testimony. As with page 10, lines 4-7, this language is responding to the
17 argument by Dr. Rosenfield “that CWF related changes in flow would reduce Delta Smelt
18 growth and recruitment through reduced turbidity and food availability. (NRDC-58, pp. 36,
19 and 39-40.” (DWR-1211, page 9:28-10:2.) Dr. Acuna rebuts this argument in lines 11-19 by
20 explaining densities of zooplankton in the context of flows and food availability. (DWR
21 1211, page 10:7-19.) This is directly responsive to Dr. Rosenfield’s argument, appropriate
22 testimony for Part 2 rebuttal, and should not be stricken.

23 **g. DWR-1211, Page 12:5-6**

24 Ms. Des Jardins moves to strike page 12, lines 5-6, on the grounds that it does not
25 reference any witness testimony and that exhibits DWR-1242 and 1243 were not used by
26 any witnesses in rebuttal. This statement is a broad statement at the beginning of Dr.
27 Acuna’s conclusion, briefly summarizing his provided testimony for which he provided
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1 references. As for exhibits DWR-1242 and DWR-1243, the Board has repeatedly held that
2 no sponsoring testimony is necessary to be admissible. “[A]n exhibit may be relevant and
3 admissible even if it is not referenced in any witness’s testimony.” (Ruling, June 18, 2018.)
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6 **V. In the Alternative, the Hearing Officers Ruling Expanding the Scope of**
7 **the Hearing to Include Evidence Regarding the Sufficiency of Existing**
8 **Regulatory Criteria Introduced a New and Substantial Question of Fact**
9 **that Requires a Permissive View of DWR Part 2 Rebuttal Testimony**

10 DWR asserts that there is ample evidence cited to in the record in order to justify
11 the rebuttal testimony of Dr. Hanson and Dr. Hutton. However, it also bears stating that
12 when the Hearing Officers ruled during Part 2 cases-in-chief to allow for the discussion of
13 existing conditions and evidence that explores the existing operations of the SWP and
14 CVP in relation to the existing conditions, it constituted an interpretation of the Hearing
15 Notice and prior rulings that was apparently unclear up to that point. DWR read the
16 October 15, 2015 Notice of the hearing to focus on the effects related to the proposed
17 change. The Water Code speaks solely in terms of changes related to the proposed
18 change. In providing this additional clarity after the submission of Part 2 case-in-chief
19 testimony, DWR was placed at a clear disadvantage. One manner of curing this potential
20 inequality is to permit DWR to respond to the general topic of existing conditions in the
21 Delta.

22 **VI. CONCLUSION**

23 For the reasoning found above, the testimony of DWR witnesses discussed above
24 have an appropriate basis in the record.

25
26 Submitted August 17, 2018.

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28 _____
(James “Tripp” Mizell)